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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

BENING COMPANY, LLC, Plaintiff and Appellant, v. NIPOMO COMMUNITY SERVICES DISTRICT, Defendant and Respondent.	2d Civil No. B286035 (Super. Ct. No. 14CV0069) (San Luis Obispo County)

BenIng Company, LLC entered into an agreement with Nipomo Community Services District (the District) to construct and develop a water and sewer system that would connect with the District's existing infrastructure to service a residential development project. BenIng claimed that the District was required to enter into an agreement to partially reimburse BenIng for the construction costs of the offsite water and sewer improvements. The trial court granted judgment for the District, finding that BenIng did not have a right of reimbursement. BenIng appeals the judgment, challenging only

the court's findings on its claimed right of reimbursement for a portion of the construction costs of a 2.5-mile waterline and improvements on wells owned by the District. We affirm.

FACTS AND PROCEDURAL HISTORY

Erik Benham was an owner and president of Trincon Incorporated, a real estate development company and the predecessor in interest to BenIng. In 1996, Trincon acquired two parcels of land (Tracts 1802 and 1856) to build homes in a development known as Maria Vista Estates (the Project). The Tracts were located outside the District's boundaries.

Trincon needed a water source and sewer services for the Project. It proposed an agreement with the District in which Trincon would build a water pipeline that would connect the District's treatment plants to the Project. Trincon would also construct improvements to two offsite and inoperative wells owned by the District (the Dana Wells) as an additional water source for the Project. In 2001, Trincon and the District entered into an "Annexation Agreement for Tracts 1802 and 1856" into the District. Trincon agreed to "construct and provide water and sewer service . . . to the area of annexation and the development contained therein, at no cost to the District."

From 2001 to 2003, Trincon and the District entered into several Plan Check and Inspection Agreements (PCIA) for the construction of the water and sewer improvements. Trincon agreed to construct and install (1) a 12-inch waterline connecting the District's water treatment plants to the Tracts, (2) improvements to the Dana Wells, and (3) offsite water and sewer

improvements.[1] The PCIA's state that after construction of improvements, "the Applicant shall . . . transf[er] absolute and unencumbered ownership of the completed [improvements] to the District (Offer of Dedication)." In return, the District would provide water and sewer services to the Project.

In 2000, Benham and other partners formed BenIng. In March 2003, BenIng and another partner formed Maria Vista Estates, GP (MVE) for the purpose of developing the Project. MVE's partnership agreement provided that it was "to acquire, own, develop, construct homes on, and/or sell [the Properties] and to distribute the net profits" to each MVE partner. The agreement stated that MVE "shall acquire" title to Tracts 1802 and 1856. MVE was to obtain a "Development Loan," which would be used in part "to pay all costs incidental to the completion of all offsite improvements and onsite infrastructure improvements required by the County of San Luis Obispo."

In accordance with MVE's partnership agreement, Trincon transferred Tract 1802 to Benham, who then transferred it to MVE in April 2003. Trincon transferred Tract 1856 to MVE in July 2003. MVE obtained loans and entered into contracts for the construction of the "off and on site" improvements. MVE subsequently began construction of the water and sewer improvements and several homes.

In 2004, MVE filed a petition for writ of mandamus, alleging that the District required MVE to construct improvements that exceeded the "needs of the Project" (i.e., 12-inch pipelines were larger than needed and the improved Dana

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[1] BenIng's opening brief does not claim a right to reimbursement for improvements other than the 2.5-mile waterline and the Dana Wells improvements.

Wells would pump more water than needed). MVE claimed a right to reimbursement pursuant to the District's reimbursement ordinance, which requires a reimbursement agreement when an applicant is required to construct a water and sewer system that has the "future potential and capacity" to serve property beyond that needed for the applicant's project. (Nipomo Community Services District Ord. No. 2008-107, § 5.01.010.)[2]

In 2006, MVE constructed several homes, but these could not be sold until the District accepted the improvements and "set water meters"[3] for the homes. MVE filed a second petition for a writ of mandamus, seeking an order to compel the District to approve and accept the improvements and set water meters. The court denied the petition, finding that MVE did not establish the District was arbitrary and capricious in refusing to accept the improvements, and that the District had shown MVE "failed to comply" with many of the requirements for acceptance.

In March 2007, MVE filed a Chapter 11 bankruptcy petition. MVE sought a court order authorizing MVE to (1) sell the completed Project homes and (2) transfer to the District all of the water and sewer improvements, subject to the District's approval. The bankruptcy court granted the motion and issued the order. The court specified that any transfer of improvements

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[2] Other pleadings or rulings regarding the 2004 writ petition are not included in the record. The District asserts the petition was dismissed in June 2007.

[3] The parties do not explain what it means to "set water meters," but it was an act that must be completed before a house could sell. We use this phrase because both parties use it throughout their briefs and it appears in the record.

to the District "shall be free and clear of . . . claims and interests of any kind or nature whatsoever."

In June 2007, MVE submitted offers of dedication of all the water and sewer improvements to the District. The District accepted the 2.5-mile waterline (and other improvements) and authorized setting 27 water meters. It did not accept the Dana Wells improvements. The District also agreed to delay the deadline for accounting of the total cost of the construction of the improvements, which was an approval prerequisite under the PCIA's, and to delay the decision to accept the Dana Wells until after the 27th water meter was set.

The District eventually set 27 meters and commenced maintenance of the water and sewer improvements. The District never accepted the Dana Wells improvements because they were not completed.

In 2009, Trincon assigned its assets and liabilities to BenIng. In 2011, MVE lost title to the Tracts through foreclosure. All rights and interests to the water and sewer improvements were assigned to Sunwood Maria Vista Estates, the successor owner.[4] In 2013, Sunwood entered into a PCIA, in which Sunwood agreed to pay the District $200,000 in lieu of completing the Dana Wells. Sunwood submitted an offer of dedication for all "onsite and offsite water and sewer improvements" it constructed. The District accepted the improvements. The 28th water meter was set in July 2013.

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[4] The bankruptcy trustee transferred the rights and interests of the Tracts to a third party, who in turn transferred to Sunwood.

In 2014, BenIng and MVE sued the District, alleging seventeen causes of action. MVE filed a request for partial dismissal, and the causes of action pertaining only to MVE (first, sixth, eleventh, and sixteenth causes of action) were dismissed from the complaint. The District filed a demurrer to the remaining causes of action. The trial court sustained the demurrer without leave to amend on the second and ninth causes of action, and overruled the demurrer to the other eleven causes of action.

In 2017, the court held a three-day court trial. BenIng alleged in the seventh cause of action that the District violated its own reimbursement ordinance by "failing to enter into an agreement with [BenIng] to reimburse" it for the costs of construction for water and sewer improvements in excess of what was needed for the Project. In the eighth cause of action, BenIng alleged that the District breached its statutory duty under Civil Code section 2224[5] by refusing to deal in good faith with BenIng and preventing it from applying for reimbursement.

The trial court ruled in favor of the District on all causes of action. On the seventh and eighth causes of action, the court stated BenIng was required to "prove that it has an ownership interest" in the water and sewer improvements, but BenIng "failed to meet its burden of proof." BenIng also "presented virtually no evidence that infrastructure construction was excessive to the project."

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[5] Civil Code section 2224 states: "One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is . . . an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it."

DISCUSSION

BenIng contends the judgment should be reversed on the seventh and eighth causes of action (for violation of the District's reimbursement ordinance and breach of duty pursuant to Civil Code section 2224) by refusing to enter into a reimbursement agreement. It also requests a remand to the trial court with directions to order the District to enter into a reimbursement agreement. BenIng argues that (1) it had a right of reimbursement pursuant to the ordinance for the costs of constructing the 2.5-mile waterline and the Dana Wells improvements, and (2) the District was unjustly enriched. We disagree with both contentions.

We review the trial court's interpretation of the District's reimbursement ordinance de novo. (*People ex rel. Kennedy v. Beaumont Investment, Ltd.* (2003) 111 Cal.App.4th 102, 113 [interpretation of local ordinances are questions of law for independent review].) We review the trial court's factual findings for substantial evidence. (*Meyers v. Board of Administration etc.* (2014) 224 Cal.App.4th 250, 256.)

Under section 5.01.010 of the Nipomo Community Services District Ordinance No. 2008-107, the District must enter a reimbursement agreement when an "applicant is required . . . to construct and install any district water or sewer facilities, which will be dedicated to the district, and which has the future potential and capacity to provide service to real property parcels, not under the control or ownership of the applicant." Reimbursement is limited to "excess costs," which are listed in No. 2008-107 section 5.01.030 of the District's ordinance.

BenIng did not have a right to reimbursement because it did not file an application. "In order to qualify for

reimbursement of excess costs, . . . applicant shall, within ninety days of district's acceptance of district facilities, deliver to district . . . [¶] Written application requesting reimbursement of excess costs; and [¶] A certified statement showing the applicant's actual costs in constructing district facilities." (Nipomo Community Services District Ord. No. 2008-107, § 5.01.031, subd. (A).)

Neither BenIng nor its predecessor, Trincon, filed an application for reimbursement. The District accepted the 2.5-mile waterline in 2007, and the time to apply for reimbursement lapsed 90 days after that acceptance. The District never accepted the Dana Wells improvements; thus, no right of reimbursement has arisen for those costs.

BenIng argues that when the District delayed the deadline for the accounting of total costs of construction of the improvements until after the 27th water meter was set, it effectively delayed the 90-day deadline to file a reimbursement application, which required a certified statement of costs. But nothing in the record supports this argument. In any event, the 28th meter was set in July 2013, but BenIng did not file an application. BenIng argues the District acted in bad faith to prevent BenIng from filing the application, but it does not cite to evidence that demonstrates bad faith. (*Claudio v. Regents of the University of California* (2005) 134 Cal.App.4th 224, 230 [appellant must provide citation to evidence in the record which supports its claims].)

BenIng also does not have a right to reimbursement because MVE, and not BenIng, owned all the rights and interests in the Project, including the improvements. The purpose of the District's ordinance is to reimburse "private parties who construct and dedicate district facilities to serve their private

property, if such facilities are also used thereafter to directly serve and benefit private property owned by others." (Nipomo Community Services District Ord. No. 2008-107, § 5.01.010, subd. (A).)

Substantial evidence shows that MVE held the rights for reimbursement to the extent such rights existed because it was the party who constructed and dedicated the improvements. MVE's partnership agreement shows that MVE was formed for the purpose of owning and developing the Project. The evidence shows that MVE obtained loans and entered into contracts to construct the onsite and offsite water and sewer improvements. Furthermore, it was MVE who submitted the offers of dedication to the District for these improvements in June 2007.

BenIng contends that it was an "applicant" eligible for reimbursement because Trincon was a "developer" of the Tracts and also contracted with the District to construct the improvements. However, the evidence shows that Trincon transferred all of its interests in the Tracts to MVE in April and July 2003, shortly after MVE was formed. As the trial court observed, "it is untenable for this Court to determine that the infrastructure constructed by [BenIng/Trincon] to benefit the transferred tracts was somehow retained by [BenIng/Trincon] and not part of [the Project]."

Prior court filings further undermine BenIng's claim. In the 2004 and 2006 writ petitions, MVE asserted its rights and ownership over the Project, including the improvements. These petitions were signed and verified by Benham. Notably, in the 2004 writ petition, MVE raised the same claims for entitlement to a reimbursement agreement that BenIng is now asserting in

this case. And, in the bankruptcy action, Benham asserted MVE's ownership of the Project in his declaration.

Even if we assume that BenIng could be an "applicant" under the ordinance, it did not present evidence of excess costs. Section 5.01.030 of No. 2008-107 of the District's ordinance has an enumerated list of what constitutes "excess costs" that are eligible for reimbursement. This includes costs for: "1. Oversizing: the estimated cost of installing the size of line required to serve applicant's needs pursuant to district's plans and specifications and the actual cost of installing a larger line at the direction of the district. [¶] 2. [Offsite] development: a pro rata share of the costs of installing district facilities and appurtenances pursuant to district plans and specifications beyond the property of the applicant that are subject to probable and future use by connectors other than applicant." (Nipomo Community Services District Ord. No. 2008-107, § 5.01.030, subd. (A).)

At trial, BenIng presented the testimony of its expert witness, who opined that a "12-inch line was not necessary" and that an 8-inch water line would have been sufficient for the area within the boundaries of the Tracts. However, the expert did not opine regarding the 2.5-mile pipeline that connected the District's water source to the Tracts, nor did he opine regarding the capacity of the Dana Wells. Moreover, the District presented contrary evidence that the 12-inch line would be "necessary for fire flows."[6]

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[6] "Fire flow" means a sufficient capacity for water flowing through the pipe to put out a potential fire at the development site.

BenIng also highlights the testimony of the District's engineer, who said that the District was planning to use the waterline to import water from the City of Santa Maria. However, this testimony does not show that the waterline was oversized or that it would be "subject to probable future use" to service other properties. BenIng did not present evidence that other properties have connected to the waterline or that there are future plans to do so.

Lastly, BenIng presented a 2003 letter from the District, which allegedly shows that the District considered the future possibility of other properties or other waterlines connecting to the 2.5-mile waterline. BenIng's reference to the 2003 letter is unavailing because (1) the letter was in response to BenIng's premature request for immediate reimbursement of the improvements before the District's acceptance, and (2) the District only posited a future possibility that owners of other properties might request a connection to the waterline, but, as the District explained, those owners would have to "seek annexation or a contract with the District" and BenIng "should not rely on a Reimbursement Agreement as a guarantee that there would be future connections to the water line." BenIng therefore did not present evidence to show that the waterline was oversized or subject to probable future use beyond that necessary for the Project. (Nipomo Community Services District Ord. No. 2008-107, § 5.01.030.)

BenIng also contends the District should pay reimbursement costs under an unjust enrichment theory. BenIng did not raise this claim below, but asserts that questions of law on undisputed facts may be raised for the first time on appeal. (*Frink v. Prod* (1982) 31 Cal.3d 166, 170.) BenIng does not show

that every fact upon which it bases its claim is undisputed. In any event, issues not raised in the trial court are generally not considered on appeal. (*Blankenship v. Allstate Ins. Co.* (2010) 186 Cal.App.4th 87, 101, fn. 5.) We decline to consider the issue here.

DISPOSITION

The judgment is affirmed. The District shall recover costs on appeal.

NOT TO BE PUBLISHED.

TANGEMAN, J.

We concur:

YEGAN, Acting P. J.

PERREN, J.

Barry T. LaBarbera, Judge

Superior Court County of San Luis Obispo

Somach Simmons & Dunn, Stuart L. Somach, Aaron A. Ferguson; Thomas L. Barnard, for Plaintiff and Appellant.

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